Invescor Sdn Bhd v Sobena Maju Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–243 OF 1999
MOKHTAR SIDIN, JAMES FOONG AND ZAINUN ALI JJCA
19 NOVEMBER 2007

Contract — Deposit — Forfeiture — Nature of 'security deposit' — Whether unconditional security deposit described in agreement between landowner and developer was true deposit or merely part payment — Security deposit not paid, whether forfeitable contract — Deposit — Part payment of purchase price — Right to forfeit — Whether express provision for forfeiture was essential

The respondent was the landowner and the appellant was the developer. The parties had, on 20 November 1987, entered into an agreement ('the agreement'), where the respondent for consideration of RM15m, allowed the appellant to develop the respondent's land ('the joint venture project'). The mode of payment of the RM15m was as followed: (1) RM200,000 upon execution of the agreement; and (2) a further sum of RM14.8m within 100 days from the date of the agreement, and this consideration was to be known as the 'security deposit'. The agreement also provided that the payment of the security deposit shall be deemed to be unconditioned payment of the landowner's share in the joint venture project payable by the developer to the landowner upon due observance and performance by the developer of all the covenants stipulations and undertaking on its part to be observed and performed. There were obligations imposed on both parties. The more significant ones affecting the respondent were that: (1) the landowner under cl 4(a) shall apply for and use its best endeavour to obtain the approval of layout plans for the development of the land from the authorities; and (2) the landowner under cl 4(b) shall be jointly responsible for evicting the squatters from the land. For doing these, the landowner was to get RM15m and discount of 10% from the selling price offered by the appellant to the public. According to cl 13 (b) of the agreement should the landowner not exercise his entitlement at the final phase of the development, 'the security deposit shall be deemed in full satisfaction of the landowner's right and interest in the land'. Subsequent to the execution of the agreement, the appellant attempted to secure a bank loan to pay the respondent the balance of RM 14.8m. In the course of this, it was discovered that the land was caveated by company known as Pembinaan dan Permaju Mahajiwa (Selangor) Sdn Bhd ('PPM'). On 6 April 1989, when the appellant failed to pay the balance of RM14.8m, the respondent by letter to the

appellant demanded payment of this sum within 14 days failing which the agreement will be terminated, and 'the sum equivalent to 10% of the security deposit forfeited'. The appellant responded by letter on 19 April 1989 stating inter alia that the agreement was not proceeded with by reason of the respondent's failure to surrender the document of title to the bankers and for the rescission of the contract the respondent had entered into with PPM and further the respondent had failed to refund the sum of RM300,000 to the appellant by 12 June 1988. The sum of RM300,000 mentioned in this letter was associated with a purported loan of RM200,000 which was supposed to be given by the appellant to the respondent to pay for the quit rent for the land. Though the agreement stipulated that this responsibility falls on the appellant, the appellant failed to carry out this obligation. Instead, it resorted to lend the respondent a sum of RM200,000 on condition that some shareholders of the respondent would deposit their share certificates in the respondent with the appellant. Despite this being complied with by the respondent's shareholders, the sum of RM200,000 was never advanced by the appellant to the respondent. Eventually, when a new group of shareholders took control of the respondent, these shares certificates were recovered from the appellant in pursuant to an order of the court. The respondent subsequently treated the appellant as having terminated the agreement and proceeded to pay the quit rent, sort out some matters relating to the documents of title to the land, and then developed the land into a housing estate. They also instituted this action against the appellant. In the claim filed by the respondent against the appellant, the respondent alleged that as a result of the appellant's unlawful termination of the agreement, the respondent should be compensated a sum of RM1.48m being 10% of the security deposit of RM15m less RM200,000 paid under the agreement. The appellant blamed the respondent for breaching a fundamental term in the agreement in awarding a contract to PPM to build houses on the land. This, the appellant claimed, deprived the appellant of the exclusive right to develop the land. Further, the appellant asserted that the respondent had breached its fiduciary duty to the appellant in not disclosing to the appellant the PPM agreement when the agreement was executed. In addition, there was consensus between the parties to reduce the security deposit to RM10.5m instead of RM15m. This, according to the appellant estopped the respondent from reverting to and relying upon the original terms of the joint venture agreement. By maintaining that the agreement was still effective, the appellant counterclaimed that the respondent should specifically perform the agreement and prior to that be restrained from acting to the contrary. Aside from this, the respondent should also pay damages for breach of the agreement and fiduciary duty.

In allowing the respondent's claim and dismissing the appellant's counterclaim, the learned trial judge provided the following reasons: (1) the agreement was revoked by the appellant soon after it was signed. There was

a board resolution of the appellant and a deed executed by the appellant to this effect and the appellant could not offer any reasonable explanation for the existence of these documents; (2) though there were proposals by the appellant to reduce the security deposit, the respondent had not accepted them. Such attempts implied that the appellant was trying to evade paying the balance of the security deposit; (3) since the appellant had failed to pay the balance of the security deposit, and the quit rent to the land, the appellant had committed a breach of the agreement which entitled the respondent to treat the agreement as having being terminated by the appellant. Dissatisfied with this outcome, the appellant appealed. The main issue for determination was whether the respondent was entitled to claim forfeiture of a sum equivalent to 10% of the consideration stated in the agreement.

Held, by majority dismissing the appeal with costs:

(1) (per **Zainun Ali JCA**, **Mokhtar Sidin JCA** concurring) The appellant chose not to pay the 'security deposit' according to the terms of the agreement. The appellant only paid the initial RM200,000. The respondent should not be in any worse position just because the deposit was not paid when the time came for it to be paid. Looking again at the agreement, the security deposit was described as 'unconditional payment' of the respondent's share in the joint venture project payable by the appellant (see paras 134–135). Money paid as a deposit cannot be paid on some terms implied or expressed. And monies to be paid as the event of the contract being performed shall be so paid. The monies to be paid in the instant appeal was not merely a part payment, it was also an earnest to bind the bargain so entered into; *Morello Sdn Bhd v Jacqaues (International) Sdn Bhd* [1995] 1 MLJ 581 followed. The contract clearly described both payments as 'security deposit'. Thus the entire amount was the deposit. Both the appellant and respondent had their respective obligations under the agreement. Whether one party's obligation was more onerous than the other was of little consequence. What was important was what their intention as manifested in the agreement (see paras 138–139).

(2) (per **Zainun Ali JCA**, **Mokhtar Sidin JCA** concurring) In view of the rights and obligations of the parties and the risk imposed on the respondent against any default by the appellant, and upon a plain reading of the agreements there was no doubt that RM1.5m represent a true deposit and that the respondent was entitled to forfeit the sum when the appellant failed to comply with cl 2(a) of the agreement (see para 140).

(3) (per **Zainun Ali JCA**, **Mokhtar Sidin JCA** concurring) Much was said by the appellant about there being no right of forfeiture in the

agreement. However an express provision for forfeiture is not an essential component. This is a contract of sale, where a deposit being an earnest for performance of a contract, conferred a consequential right of forfeiture (subject to its constructions and terms and conditions). The critical factor is the character of the payment which is largely dependent on the parties' intention, ascertained by construing the agreement (see paras 141–142).

(4) (per **Zainun Ali JCA**, **Mokhtar Sidin JCA** concurring) The test normally accepted to ascertain whether a sum is within the bounds of as earnest of performance and therefore deemed a true deposit is where it represents 10% of the purchase price of the land. In short, it is conventionally accepted that a deposit of 10% is a true deposit. As case laws in various jurisdictions have shown, a deposit of 10% of the purchase price is quite commonplace and has enjoyed widespread commercial approval and acceptance. So too, in the instant appeal. Thus,the respondent was entitled to a forfeiture of 10% of the total consideration of RM15m, discounting the RM200,000 already paid (see paras 149–151).

(5) (per **James Foong JCA** dissenting) Although the trial judge had found the appellant's own resolution and deed of revocation of the agreement to be a ground for allowing the respondent's claim and dismissing the appellant's counterclaim, both parties had continued to treat and consider the agreement as valid and subsisting. This was right up to the termination of the agreement which was many years after these documents were executed. Such acts vitiated any adverse effect these documents had on the agreement (see para 18).

(6) (per **James Foong JCA** dissenting) The PPM agreement would not have affected the exclusive right of the appellant in developing the land as specified under the terms of the agreement since PPM was only appointed as a contractor to build on the land as compared to the appellant who was the developer. Moreover, the appellant had agreed to accept PPM as the main contractor for the land in April 1988. This was reflected in the respondent's letter to the appellant on 11 April 1988. By these actions, the appellant had acquiesced to the terms of the PPM agreement and could not deny that the PPM agreement had affected its exclusive right to develop the land under the agreement (see paras 24–26 & 28).

(7) (per **James Foong JCA** dissenting) In view of the fact that the appellant had accepted and adopted the PPM agreement, the appellant's claim that the respondent had breached its fiduciary duty to the appellant by not disclosing the PPM agreement was no longer sustainable; the appellant had acquiesced to it (see para 29).

(8) (per **James Foong JCA** dissenting) The learned trial judge was right that it was the appellant who breached the agreement and not the respondent. The appellant had failed to pay the balance of the security deposit within the stipulated time and despite indulgence by the respondent, continued to breach this obligation until the termination of the grace period given by the respondent in its letter of demand of 6 April 1989. Once the 14 days period stated therein expired, the agreement was considered unlawfully terminated by the appellant (see para 31).

(9) (per **James Foong JCA** dissenting) The respondent was claiming not just money received but also a portion of that which had yet to be paid. The total amount claimed by the respondent was RM1.48m which, represented 10% of RM15m after deducting RM200,000 received by the respondent from the appellant under the agreement. Since the transaction between the parties was actually a sale and purchase of the land rather than one of a joint venture to develop the land, this security deposit was the consideration for this sale and purchase (see para 32); *Karuppiah v Petaling Garden Co Sdn Bhd* [1972] 1 MLJ 173; *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2005] 2 CLJ 914; *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89; *Pendergrast v Chapman* (1988) 2 NZLR 177; *Damon Cia Naviera SA v Hapag-Lloyd International SA* [1985] 1 All ER 475 and *Bot v Ristevski* [1981] VR 120 distinguished.

(10)(per **James Foong JCA** dissenting) Since the transaction was one of sale and purchase of land, then obviously the purchase price must be the RM15m. How was this to be paid was clearly set out in cl 2(a) of the agreement: RM200,000 considered paid upon execution of the agreement and RM14.8m within 100 days thereafter. This entire method of payment must inevitably be construed as payment in parts with no deposit. If so, the respondent would not be entitled to any forfeiture. The respondent's argument that the entire consideration of RM15m stated in the agreement was the deposit could not as one cannot have the entire consideration as a deposit. If it is, then the true meaning of deposit is lost. Further, if the entire sum of RM15m was the deposit, then why did the respondent not claim for this entire sum but rather only 10% of it. So obviously, by the nature of its claim, the respondent had resigned itself to the fact that the sum of RM15m was the entire consideration rather than a deposit (see para 42).

(11)(per **James Foong JCA** dissenting) When the amount stated was meant to be a part payment then it cannot be subjected to forfeiture. The innocent party is only entitled to sue for damages for breach of contract and damages has to be proved (see para 43); *Linggi Plantations*

Ltd v Jagatheesan; *Mayson v Clouet & Anor* [1924] AC 980; and *Howe v Smith* (1884) 27 Ch D 89 followed. A

(12)(per **James Foong JCA** dissenting) Since no deposit was ever mentioned in the instant case and when actual loss or damage can be quantified by known and established measures then in absence of evidence to prove actual loss or damage, the respondent's claim for an aggregated sum of 10% of the consideration mentioned in the agreement should not be allowed. If at all any sum is to be forfeited, then it would only be the RM200,000 which was paid at the time of the execution of the agreement. This could be considered as 'deposit or earnest money' (see para 48); *Selva Kumar a/l Murugiah v Thiagarajah a/l Rernasamy* [1995] 1 MLJ 817 followed. B C

[Bahasa Malaysia summary D

Responden adalah pemilik tanah dan perayu adalah pemaju. Pihak-pihak telah, pada 20 November 1987, memasuki satu perjanjian ('perjanjian tersebut'), yang mana responden untuk balasan RM15j, telah membenarkan perayu memajukan tanah responden ('projek usahasama'). Cara pembayaran RM15j itu adalah seperti berikut: (1) RM200,000 setelah memasuki perjanjian; dan (2) jumlah berikutnya RM14.8j dalam tempoh 100 hari daripada tarikh perjanjian, dan balasan ini hendaklah dikenali sebagai 'deposit sekuriti'. Perjanjian itu juga memperuntukkan bahawa pembayaran deposit sekuriti hendaklah dianggap sebagai pembayaran tanpa syarat ke atas bahagian pemilik tanah dalam projek usahasama oleh pemaju yang perlu dibayar oleh pemaju kepada pemilik tanah setelah diteliti dan dilaksanakan oleh pemaju kesemua syarat-syarat yang ditetapkan dan diakui di pihaknya yang patut diteliti dan dilaksanakan. Tanggungjawab tersebut dikenakan ke atas kedua-dua pihak. Antara yang lebih memberi kesan kepada responden adalah bahawa: (1) pemilik tanah di bawah fasal 4(a) hendaklah memohon untuk dan berusaha untuk memperoleh kelulusan pelan-pelan susun atur untuk pembangunan tanah itu daripada pihak berkuasa; dan (2) pemilik tanah di bawah fasal 4(b) hendaklah bersama memikul tanggungjawab untuk menghalau penduduk setinggan daripada tanah itu. Untuk berbuat sedemikian, pemilik tanah akan menerima RM15j dan potongan 10% daripada harga jualan yang ditawarkan oleh perayu kepada orang awam. Menurut fasal 13(b) perjanjian sekiranya pemilik tanah tidak menggunakan haknya di peringkat akhir pembangunan, 'the security deposit shall be deemed in full satisfaction of the landowner's right and interest in the land'. Berikutan penyempurnaan perjanjian itu, perayu telah cuba mendapatkan pinjaman bank untuk membayar responden baki RM14.8j. Semasa ini, ia mendapati bahawa tanah itu telah dikaveatkan oleh syarikat dikenali sebagai Pembinaan dan Permaju Mahajiwa (Selangor) Sdn Bhd ('PPM'). Pada 6 April 1989, semasa perayu gagal untuk membayar baki RM14.8j itu, responden E F G H I

melalui sepucuk surat kepada perayu telah menuntut bayaran untuk jumlah ini dalam tempoh 14 hari dan sekiranya gagal perjanjian itu akan ditamatkan, dan 'the sum equivalent to 10% of the security deposit forfeited'. Perayu telah menjawab melalui surat bertarikh 19 April 1989 menyatakan antara lain bahawa perjanjian itu tidak diteruskan oleh sebab kegagalan responden menyerahkan dokumen hak milik kepada pengurus bank dan untuk pembatalan kontrak itu yang responden telah memasuki dengan PPM dan seterusnya responden telah gagal membayar balik jumlah RM300,000 kepada perayu pada 12 Jun 1988. Jumlah RM300,000 yang dinyatakan dalam surat ini berkait dengan pinjaman yang dikatakan sebanyak RM200,000 yang sepatutnya diberikan oleh perayu kepada responden untuk membayar cukai pintu tanah itu. Meskipun perjanjian itu menetapkan bahawa tanggungjawab ini patut dipikul oleh perayu, perayu telah gagal untuk melaksanakan obligasi ini. Sebaliknya, ia telah memberi pinjaman kepada responden sejumlah RM200,000 dengan syarat yang beberapa pemegang saham responden akan mendepositkan sijil-sijil saham mereka dalam responden dengan perayu. Meskipun ini telah dipatuhi oleh pemegang-pemegang saham responden, jumlah RM200,000 tidak dikemukakan oleh perayu kepada responden. Akhirnya, apabila kumpulan pemegang saham baru mengambil alih kawalan ke atas responden, sijil-sijil saham tersebut dapat diperoleh daripada perayu menurut satu perintah mahkamah. Responden seterusnya menganggap perayu telah menamatkan perjanjian itu dan membayar cukai pintu, menyelesaikan beberapa perkara berkaitan dengan dokumen hak milik tanah itu, dan kemudian memajukan tanah itu menjadi estet perumahan. Mereka juga telah memulakan tindakan ini terhadap perayu. Dalam tuntutan yang difailkan oleh responden terhadap perayu, responden telah mendakwa bahawa akibat penamatan perjanjian perayu yang tidak sah, responden hendaklah diberikan pampasan sejumlah RM1.48j yang merupakan 10% daripada deposit sekuriti RM15j kurang RM200,000 yang telah dibayar di bawah perjanjian itu. Perayu telah menyalahkan responden kerana melanggar terma penting perjanjian dalam mengawardkan kontrak kepada PPM untuk membina rumah-rumah di atas tanah itu. Ini, didakwa oleh perayu, telah memberi kilanan kepada perayu hak eksklusif untuk memajukan tanah itu. Bahkan, perayu menegaskan bahawa responden telah melanggar tanggungjawab fidusiari kepada perayu kerana tidak mendedahkan perayu kepada perayu perjanjian PPM semasa perjanjian itu disempurnakan. Tambahan pula, terdapat konsensus antara pihak-pihak untuk mengurangkan deposit sekuriti kepada RM10.5j daripada RM15j. Ini, menurut perayu telah mengestopkan responden daripada berbalik dan bergantung kepada terma asal perjanjian usahasama itu. Dengan menegaskan bahawa perjanjian itu masih berkuat kuasa, perayu telah membuat tuntutan balas bahawa responden hendaklah melaksanakan secara spesifik perjanjian itu dan sebelum itu dihalang daripada bertindak sebaliknya. Selain daripada ini, responden juga hendaklah membayar ganti rugi untuk pelanggaran perjanjian dan tanggungjawab fidusiari.

Dalam membenarkan tuntutan responden dan menolak tuntutan balas perayu, hakim perbicaraan yang bijaksana telah memperuntukkan alasan-alasan berikut: (1) perjanjian itu dibatalkan oleh perayu sejurus selepas ia ditandatangani. Terdapat lembaga resolusi perayu dan satu surat ikatan disempurnakan oleh perayu terhadapnya dan perayu tidak dapat memberikan apa-apa penjelasan munasabah untuk kewujudan dokumen-dokumen tersebut; (2) meskipun terdapat cadangan oleh perayu untuk mengurangkan deposit sekuriti, responden tidak menerimanya. Percubaan sedemikian memberi andaian bahawa perayu cuba mengelak daripada membayar baki deposit sekuriti itu; (3) memandangkan perayu telah gagal untuk membayar baki deposit sekuriti itu, dan cukai pintu ke atas tanah tersebut, perayu telah melakukan satu pelanggaran perjanjian yang memberi hak kepada responden untuk menganggap perjanjian itu sebagai telah ditamatkan oleh perayu. Berasa tidak puas hati dengan keputusan ini, perayu telah merayu. Isu utama untuk ditentukan adalah sama ada responden berhak menuntut untuk mendapat balik jumlah yang sama dengan balasan 10% yang dinyatakan dalam perjanjian tersebut.

Diputuskan, dengan majoriti menolak rayuan dengan kos:

(1) (oleh **Zainun Ali HMR**, **Mokhtar Sidin HMR** bersetuju) Perayu memilih untuk tidak membayar 'security deposit' menurut terma perjanjian itu. Perayu hanya membayar pendahuluan RM200,000. Responden tidak berada dalam kedudukan yang jauh lebih teruk hanya kerana deposit itu tidak dibayar sewaktu ia patut dibayar (lihat perenggan). Melihat perjanjian itu semula, deposit sekuriti itu digambarkan sebagai 'unconditional payment' terhadap saham responden dalam projek usahasama yang perlu dibayar oleh perayu (lihat perenggan 134–135). Wang yang dibayar sebagai deposit tidak boleh dibayar berdasarkan terma tersirat atau nyata. Dan wang yang perlu dibayar semasa kontrak dilaksanakan hendaklah dibayar. Wang yang patut dibayar dalam rayuan semasa bukan hanya merupakan bayaran ansuran, ia juga jaminan yang mengikat tawaran yang dimasuki; *Morello Sdn Bhd v Jacqaues (International) Sdn Bhd* [1995] 1 MLJ 581 diikut. Kontrak itu jelas menggambarkan kedua-dua bayaran itu sebagai 'security deposit'. Oleh itu keseluruhan jumlah itu merupakan deposit. Kedua-dua perayu dan responden mempunyai tanggungjawab masing-masing di bawah perjanjian tersebut. Sama ada tanggungjawab satu pihak lebih utama daripada yang satu lagi tidaklah penting. Apa yang penting adalah niat mereka seperti yang dinyatakan dalam perjanjian tersebut (lihat perenggan 138–139).

(2) (oleh **Zainun Ali HMR**, **Mokhtar Sidin HMR** bersetuju) Berdasarkan hak dan tanggungjawab pihak-pihak dan risiko yang dikenakan ke atas

responden terhadap apa-apa kegagalan oleh perayu, dan berdasarkan bacaan biasa perjanjian-perjanjian itu tidak diragui bahawa RM1.5j itu merupakan deposit sebenar dan bahawa responden berhak untuk mendapat balik jumlah itu apabila perayu gagal mematuhi fasal 2(a) perjanjian tersebut (lihat perenggan 140).

(3) (oleh **Zainun Ali HMR**, **Mokhtar Sidin HMR** bersetuju) Banyak yang diperkatakan oleh perayu tentang tiadanya hak untuk rampasan dalam perjanjian itu. Namun satu peruntukan nyata untuk rampasan bukan komponen penting. Ini adalah kontrak jualan, di mana satu deposit merupakan wang cengkeram untuk melaksanakan kontrak, yang memberikan hak penting untuk rampasan (tertakluk kepada pembentukan dan terma dan syaratnya). Faktor penting adalah sifat bayaran yang bergantung kepada niat pihak-pihak, yang ditentukan dengan mentafsir perjanjian tersebut (lihat perenggan 149–151).

(4) (oleh **Zainun Ali HMR**, **Mokhtar Sidin HMR** bersetuju) Ujian yang biasa diterima untuk menentukan sama ada suatu jumlah itu terangkum sebagai jaminan pelaksanaan dan oleh itu dianggap suatu deposit sebenar adalah ia mana ia mewakili 10% daripada harga belian tanah itu. Pendek kata, ia biasanya diterima bahawa suatu deposit 10% adalah suatu deposit sebenar. Seperti ditunjukkan dalam kes-kes perundangan dalam pelbagai penghakiman, suatu deposit 10% daripada harga belian adalah biasa dan mendapat kelulusan dan penerimaan meluas. Begitu juga dalam rayuan ini. Oleh itu, responden berhak terhadap rampasan 10% daripada keseluruhan balasan sejumlah RM15j itu, dengan memotong RM200,000 yang telahpun dibayar (lihat perenggan 18).

(5) (oleh **James Foong HMR** menentang) Meskipun hakim perbicaraan mendapati resolusi perayu sendiri dan surat ikatan perjanjian itu sebagai asas membenarkan tuntutan responden dan menolak tuntutan balas perayu, kedua-dua pihak terus menganggap perjanjian itu sah dan masih wujud. Ini berlaku sehinggalah penamatan perjanjian beberapa tahun selepas dokumen-dokumen tersebut disempurnakan. Tindakan sebegini menjadikan apa-apa kesan buruk dokumen-dokumen ke atas perjanjian itu sebagai tidak sah (lihat perenggan 24–26 & 28).

(6) (oleh J**ames Foong HMR** menentang) Perjanjian PPM tidak mungkin menjejaskan hak eksklusif perayu untuk memajukan tanah tersebut seperti yang ditetapkan di bawah terma perjanjian memandangkan PPM hanya dilantik sebagai kontraktor untuk membina atas tanah itu dibandingkan dengan perayu yang merupakan pemaju. Bahkan, perayu telah bersetuju untuk menerima PPM sebagai kontraktor utama untuk tanah itu pada bulan April 1988. Ini digambarkan dalam surat responden kepada perayu pada 11 April 1988. Melalui tindakan berikut, perayu telah memberikan persetujuan terhadap terma-terma

perjanjian PPM dan tidak boleh menafikan bahawa perjanjian PPM telah menjejaskan hak eksklusifnya untuk memajukan tanah tersebut di bawah perjanjian itu (lihat perenggan 29).

(7) (oleh **James Foong HMR** menentang) Berdasarkan fakta bahawa perayu telah menerima dan menggunakan perjanjian PPM, tuntutan perayu bahawa responden telah melanggar tugas fidusiarinya kepada perayu keran tidak mendedahkan perjanjian PPM tidak boleh dikekalkan; perayu telahpun memberikan persetujuan terhadapnya (lihat perenggan 31).

(8) (oleh **James Foong HMR** menentang) Hakim perbicaraan yang bijaksana betul bahawa ia adalah perayu yang telah melanggar perjanjian itu dan bukan responden. Perayu telah gagal untuk membayar baki deposit sekuriti dalam tempoh yang ditetapkan dan meskipun diturut oleh responden, masih terus melanggar tanggungjawab ini sehingga penamatan tempoh lanjutan yang diberikan oleh responden dalam surat tuntutannya bertarikh 6 April 1989. Selepas tempoh 14 hari yang dinyatakan tamat, perjanjian tersebut dianggap telah ditamatkan secara tidak sah oleh perayu (lihat perenggan).

(9) (oleh **James Foong HMR** menentang) Responden bukan sahaja menuntut wang yang diterima tetapi juga sebahagian yang belum dibayar. Jumlah keseluruhan yang dituntut oleh responden adalah RM1.48j yang, mewakili 10% daripada RM15j selepas memotong RM200,000 yang telah diterima oleh responden daripada perayu di bawah perjanjian itu. Memandangkan transaksi antara pihak-pihak sebenarnya satu jual beli tanah dan bukan satu usahasama untuk memajukan tanah tersebut, deposit sekuriti ini merupakan balasan untuk jual beli ini (lihat perenggan 32); *Karuppiah v Petaling Garden Co Sdn Bhd* [1972] 1 MLJ 173; *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2005] 2 CLJ 914; *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89; *Pendergrast v Chapman* (1988) 2 NZLR 177; *Damon Cia Naviera SA v Hapag-Lloyd International SA* [1985] 1 All ER 475 dan *Bot v Ristevski* [1981] VR 120 dibeza.

(10)(oleh **James Foong HMR** menentang) Memandangkan transaksi ini suatu jual beli tanah, maka jelas harga belian semestinya RM15j. Bagaimana ia dibayar jelas ditetapkan dalam fasal 2(a) perjanjian: RM200,000 dianggap telah dibayar selepas penyempurnaan perjanjian dan RM14.8j dalam tempoh 100 hari berikutnya. Keseluruhan cara pembayaran hendaklah ditafsirkan sebagai bayaran ansuran tanpa deposit. Jika begitu, responden tidak berhak mendapat apa-apa balik. Hujah responden bahawa keseluruhan balasan RM15j yang dinyatakan dalam perjanjian adalah di mana deposit itu tidak boleh dianggap sebagai keseluruhan balasan itu sebagai deposit. Jika begitu, maka

maksud sebenar deposit itu lenyap. Bahkan, jika keseluruhan jumlah RM15j merupakan deposit maka kenapa pula responden tidak menuntut keseluruhan jumlah ini tetapi sebaliknya hanya 10% daripadanya. Oleh itu adalah jelas, berdasarkan sifat tuntutnya, responden telah menyisihkan dirinya daripada hakikat bahawa jumlah RM15j itu merupakan keseluruhan balasan dan bukan suatu deposit (lihat perenggan 42).

(11)oleh **James Foong HMR** menentang) Apabila jumlah yang dinyatakan bermaksud untuk dijadikan sebahagian daripada bayaran maka ia tidak boleh dijadikan subjek rampasan. Pihak yang tidak bersalah hanya berhak menyaman untuk ganti rugi kerana pelanggaran kontrak dang anti rugi itu telah dibuktikan (lihat perenggan 43); *Linggi Plantations Ltd v Jagatheesan*; *Mayson v Clouet & Anor* [1924] AC 980; dan *Howe v Smith* (1884) 27 Ch D 89 diikut.

(12)(oleh **James Foong HMR** menentang) Memandangkan tiada deposit pernah dinyatakan dalam kes semasa dan apabila kerugian atau kehilangan sebenar boleh dikira melalui taksiran yang dikenali dan diamalkan maka dalam ketiadaan keterangan untuk membuktikan kehilangan atau kerugian sebenar, tuntutan responden untuk jumlah agregat 10% daripada balasan yang dinyatakan dalam perjanjian tidak patut dibenarkan. Jikapun terdapat apa-apa jumlah yang dirampas, maka ia hanyalah RM200,000 itu yang telah dibayar pada masa penyempurnaan perjanjian tersebut. Ini boleh dianggap sebagai 'deposit or earnest money' (lihat perenggan 48); *Selva Kumar a/l Murugiah v Thiagarajah a/l Rernasamy* [1995] 1 MLJ 817 diikut.]

Notes

For cases on forfeiture, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3435–3436.

Cases referred to

Bot v Ristevski [1981] VR 120 (distd)
Chaplin v Hicks [1911] 2 KB 286 (refd)
Damon Cia Naviera SA v Hapag-Lloyd International SA [1985] 1 All ER 475 (distd)
Ex p Barrel LR 10 Ch 512 (refd)
Fibroska Spolka Kevina v Fairbairn F9431 (refd)
Howe v Smith (1884) 27 Ch D 89 (folld)
Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2005] 2 CLJ 914 (distd)
Karuppiah v Petaling Garden Co Sdn Bhd [1972] 1 MLJ 173 (distd)
Koh Siak Poo v Sayang Plantation Bhd [2002] 1 MLJ 65 (refd)
Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89 (distd)
Mayson v Clouet & Anor [1924] AC 980 (folld)

Morello Sdn Bhd v Jacqaues (International) Sdn Bhd [1995] 1 MLJ 581 (folld)
Pendergrast v Chapman (1988) 2 NZLR 177 (distd)
Polyset-Pendergrast v Chapman [1988] 2 NZLR 177 (refd)
Polyset Ltd v Panhandat Ltd [2002] 3 HKLRD 319 (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Rernasamy [1995] 1 MLJ 817 (folld)
Soper v Arnold [1889] 14 App Cas 429 (refd)
Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd [1987] 2 MLJ 711 (refd)

Legislation referred to
Contracts Act 1950 ss 26, 40, 65, 66, 74

Appeal from: Civil Suit No S7–22–366 of 1989 (High Court, Kuala Lumpur)

GK Ganesan (Philip Choong, Manjit Singh with him) (Philip Choong & Co) for the appellant.
Dato RR Sethu (RR Sethu) for the respondent.

James Foong JCA (delivering dissenting judgment):

INTRODUCTION

[1] The brief and pertinent facts of this case are these: The respondent was the registered proprietor of two parcels of land held under HS(D) 53373 for lot PT 2202 in the Mukim of Petaling, Daerah Wilayah Persekutuan, and HS(D) 53372 for lot PT 5 Sek 7, Pekan Sungai Besi, Daerah Wilayah Persekutuan ('the land'). On 20 November 1987, the respondent entered into a sort of joint venture agreement ('the agreement') with the appellant where the respondent allowed the appellant to 'develop the said land by building thereon various types of buildings together with infrastructures common facilities convenience and other amenities in accordance with plans to be approved by the relevant authorities and subject to the terms and upon the conditions hereafter contained'. In consideration for this, the appellant has to pay the respondent a sum of RM15m as security deposit. Under cl 2 of the agreement, this sum is to be paid in the following manner: RM200,000 upon execution of the agreement and the balance of RM14.8m within 100 days from date of the said agreement. In the event of the appellant failing to pay this balance sum within the period as stipulated, 'the landowner shall be entitled by notice in writing to the developer to terminate this agreement'. The agreement then went on to say that the 'payment of the security deposit shall be deemed to be unconditional payment of the landowner's share in the joint venture project payable by the developer to the landowner upon due

observance and performance by the developer of all the covenants stipulations and undertakings on its part to be observed and performed herein'. And under cl 13 of the agreement, it is stipulated that after the buildings on the said land are erected, the respondent is entitled to a 10% discount on the price of the buildings offered for sale to the public and if this entitlement is not exercised at the final phase of the development, the security deposit 'shall be deemed in full satisfaction of the landowner's right and interest in the said Land'.

[2] Crafted in this manner, I agree with Dato RR Sethu, counsel for the respondent, that this agreement though termed as a joint venture agreement is in actual fact a sale and purchase of the said land. The importance of this will become apparent when dealing with the issue of the forfeiture of 10% of the purchase price due to the failure of the appellant to pay to the respondent the balance sum of RM14.8m, a fact which is not in dispute.

[3] Subsequent to the execution of the agreement, the appellant attempted to secure a bank loan to pay the respondent the balance of RM14.8m. In the course of this, it was discovered that the said land was caveated by company known as Pembinaan dan Permaju Mahajiwa (Selangor) Sdn Bhd (PPM Sdn Bhd). The ground for the lodgment of this caveat was that PPM Sdn Bhd had given a loan of RM442,914 to the respondent in consideration of the respondent agreeing to appoint PPM Sdn Bhd as the main contractor to build houses on the said land. There was a written agreement dated 26 May 1987 ('PPM agreement') between the parties to this effect.

[4] This PPM agreement is the major ground relied on by the appellant to dispute the respondent's claim in this case and it is the foundation of its counterclaim against the respondent; a matter which will become apparent later.

[5] On 6 April 1989, when the appellant failed to pay the balance of RM14.8m, the respondent by letter to the appellant demanded payment of this sum within 14 days failing which the agreement will be terminated, and 'the sum equivalent to 10% of the security deposit forfeited'.

[6] The appellant responded by letter on 19 April 1989 stating inter alia that:

> the joint venture agreement was not proceeded with by reason of your failure to surrender the document of title to the Bankers and for the rescission of the contract you have entered into with Pembinan Dan Pemaju Mahajiwa (Selangor) Sdn Bhd and further you have failed to refund the sum of RM300,000 to us by 12 June 1988.

Further in November 1988 we were informed by all the Shareholders of your Company that you were in the position once again to enter into a joint venture with us at $10.5m subject to the terms and conditions which have subsequently been set out in our letter of 28 March 1989.

[7] The sum of RM300,000 mentioned in this letter was associated with a purported loan of RM200,000 which was supposed to be given by the appellant to the respondent to pay for the quit rent for the said land. Though the agreement stipulates that this responsibility falls on the appellant, the appellant failed to carry out this obligation. Instead, it resorted to lend the respondent a sum of RM200,000 on condition that some shareholders of the respondent would deposit their share certificates in the respondent with the appellant. Despite this being complied with by the respondent's shareholders, the sum of RM200,000 was never advanced by the appellant to the respondent. Eventually, when a new group of shareholders took control of the respondent, these shares certificates were recovered from the appellant in pursuant to an order of the court.

[8] After the new shareholders of the respondent took control of the respondent they treated the appellant as having terminated the agreement and proceeded to pay the quit rent, sort out some matters relating to the documents of title to the said land, and then developed the said land into a housing estate. They also instituted this action against the appellant.

RESPONDENT'S CLAIM

[9] In the claimed filed by the respondent against the appellant, the respondent alleged that as a result of the appellant's unlawful termination of the agreement, the respondent should be compensated a sum of RM1.48m being 10% of the security deposit of RM15m less RM200,000 paid under the agreement. Aside from this, there should be interest at 8% per annum thereon from 6 April 1989 to date of realization and costs.

APPELLANT'S DEFENCE & COUNTERCLAIM

[10] The appellant's defence repeated substantially what was stated in its letter to the appellant on 19 April 1989 which blamed the respondent for breaching a fundamental term in the agreement in awarding a contract to PPM Sdn Bhd to build houses on the said land. This, the appellant claimed, deprived the appellant of the exclusive right to develop the said land. Further, the appellant asserted that the respondent has breached its fiduciary duty to the appellant in not disclosing to the appellant the PPM agreement when the agreement was executed. In addition, there was consensus between the parties to reduce the security deposit to RM10.5m instead of RM15m.

This, according to the appellant 'estopped (the respondent) from reverting to and relying upon the original terms of the joint venture agreement'. By maintaining that the agreement is still effective, the appellant counterclaim that the respondent should specifically perform the agreement and prior to that be restrained from acting to the contrary. Aside from this, the respondent should also pay damages for breach of the agreement and fiduciary duty.

DECISION OF THE TRIAL JUDGE

[11] In allowing the respondent's claim and dismissing the appellant's counterclaim, the learned trial judge provided the following reasons:

(1) The agreement was revoked by the appellant soon after it was signed. There was a board resolution of the appellant and a deed executed by the appellant to this effect and the appellant could not offer any reasonable explanation for the existence of these documents.

(2) Though there were proposals by the appellant to reduce the security deposit, the respondent had not accepted them. Such attempts imply that the appellant was trying to evade paying the balance of the security deposit.

(3) Since the appellant has failed to pay the balance of the security deposit, and the quit rent to the said land, the appellant had committed a breach of the agreement which entitled the respondent to treat the agreement as having being terminated by the appellant.

[12] Dissatisfied with this outcome, the appellant appealed to us.

APPELLANT'S ARGUMENT

[13] Mr GK Ganesan, counsel for the appellant, submitted that there was a total failure of consideration in the agreement caused by the existence of the PPM agreement which is 'substantially the same, if not identical' with the terms of the agreement. This deprived the appellant of its exclusive right to develop the said land which was the appellant's main benefit in this transaction. Since the respondent could not perform its obligation to deliver to the appellant this exclusive right there was failure of consideration in the agreement. Alternatively, by failing to deliver to the appellant this exclusive right to develop the said land, the respondent had committed a fundamental breach in the agreement thereby rendering the agreement void or voidable. Void under s 26 of the Contracts Act 1950 which says that 'an agreement made without consideration is void', and voidable under s 40 of the Contracts Act 1950 which says that when a party has refused or disabled himself from performing his promise in its entirety, the innocent may put an

end to the contract unless he has acquiesced to its continuance. For the latter, the appellant has two options: either to treat 'the contract as having come to an end (void) and seek the refund (restitution) of all monies paid (restitution), or he may reset his claim on the basis of the contract and seek damages for breach' under s 74 of the Contracts Act 1950. Because the appellant possess such options, the respondent is not entitled to forfeit any money of the appellant, paid or to be paid under the agreement.

[14] Next, Mr Ganesan turned to the appellant's claim of a breach of fiduciary duty owed by the respondent to the appellant in failing to disclose to the appellant at the time of the execution of the agreement the existence of the PPM agreement. He said that the respondent, as a joint venture partner with the appellant, should have been true and honest with the appellant.

[15] Finally, Mr Ganesan claimed that the respondent's conduct in concealing the PPM agreement from the appellant amounted to an actionable misrepresentation making the agreement voidable.

Issues

[16] From the above, the following are the issues for determination in this appeal:

(1) What is the effect of the appellant's resolution and deed of revocation of the agreement?

(2) Was there a total failure of consideration or breach by the respondent of a fundamental term in the agreement?

(3) Was there a breach of fiduciary duty by the respondent?

(4) Was there an actionable misrepresentation?

(5) If the above is answered in the negative, is the respondent entitled to claim forfeiture of a sum equivalent to 10% of the consideration stated in the agreement?

[17] I will consider each of these in turn.

Analysis

Are the appellant's resolution and the deed of revocation of the agreement of any effect?

[18] As the trial judge has found the appellant's own resolution and deed

of revocation of the agreement to be a ground for allowing the respondent's claim and dismissing the appellant's counterclaim, it is necessary to deliberate on it. I agree that there was no reasonable explanation offered to the existence of these documents, nevertheless both parties continued to treat and consider the agreement as valid and subsisting. This was right up to the termination of the agreement which was many years after these documents were executed. Such acts vitiate any adverse effect these documents have on the agreement. On this ground, I disagree with the learned trial judge's reasoning in arriving at her conclusion over the matter.

Was there a total failure of consideration or breach by the respondent of a fundamental term in the agreement?

[19] To ascertain this, it is necessary at the outset to examine the terms of the PPM agreement since it is due to this impugned contract that the appellant's contentions are founded. This document consists of only 10 clauses and a short schedule. I shall just disclose the pertinent terms.

[20] Clause 1 of the operative part declares that the respondent 'agrees to appoint the contractor (PPM Sdn Bhd) as its main contractor for the said development subject to the terms and conditions hereinafter contained'.

[21] Clause 2 provides that upon execution of the agreement, PPM Sdn Bhd is to advance a friendly loan of RM442,914 to the respondent and this loan is to be utilized towards purchase of the said land and is repayable to the contractor within six months from date hereof.

[22] Clause 3 states that contract works 'shall be as specified in schedule B upon a mutually agreed contract sum', and schedule B listed out the type of buildings and infrastructure to be constructed on the said land.

[23] Clause 7 says that, 'Notwithstanding the foil repayment of the said loan, the other provisions herein provided shall continue thereafter to submit (sic) for as long as may be necessary for the purpose of giving foil effect to each and every provision in accordance with the terms of this agreement'.

[24] Against the facts as presented, I do not think that this PPM Agreement would have affected the exclusive right of the appellant in developing the said land as specified under the terms of the Agreement. The reasons are as follows:

[25] First, PPM Sdn Bhd was only appointed as a contractor to build on the said land as compared to the appellant who was the developer. As a

developer, the appellant has absolute right and control over the nature of the development (subject of course to the approval of the relevant authorities) and the price of the houses or buildings to be sold. PPM Sdn Bhd has no say on all of these. Under the PPM agreement, PPM Sdn Bhd's role was only to construct and build on the said land and even the cost of construction had to be 'mutually agreed' upon. And if this could not be agreed, there was no obligation upon the respondent or its successor in title to be bound with the services of PPM Sdn Bhd. It is therefore apparent that this PPM agreement does not affect the appellant's exclusive right to develop the said land as provided by the agreement.

[26] Second, the appellant had agreed to accept PPM Sdn Bhd as the main contractor for the said land in April of 1988. This is reflected in the respondent's letter to the appellant on 11 April 1988 (p 262 of the appeal record) which reads:

> This is to inform and confirm that at the said meeting, Dato' Chan requested for a two months extension to finalise the loan documentation and disbursement and Dato' Chan had agreed that Pembinaan dan Pemaju Mahajiwa (Selangor) Sdn Bhd ('Mahajiwa') will be retained/appointed as the main contractor for the project under the abovesaid agreement

[27] The appellant's solicitors, Ms Philip Choong & Co's reply to the respondent on 13 April 1988 (see p 264 of the appeal record) confirmed this in this manner:

> we are instructed that our clients are prepared to acknowledge the agreement entered into between you and Pembinaan Dan Pemaju Mahajiwa (Selangor) Sdn Bhd dated 26 May 1987...

[28] By these actions, the appellant had acquiesced to the terms of the PPM agreement and cannot now deny that the PPM agreement had affected its exclusive right to develop the said land under the agreement.

Was there a breach of fiduciary duty by the respondent?

[29] In view of the fact that the appellant had accepted and adopted the PPM agreement, the appellant's claim that the respondent had breached its fiduciary duty to the appellant by not disclosing the PPM agreement is no longer sustainable; the appellant has acquiesced to it.

Was there an actionable misrepresentation?

[30] On the appellant's claim of an actionable misrepresentation by the

respondent, all that I need to say is that this matter was never pleaded. It is trite that when an issue is not pleaded, the court will not entertain it. Even if I were to consider this as pleaded the appellant had elected to treat the agreement as subsisting from the time the PPM agreement was discovered till the time when the respondent gave written notice to the appellant to pay up the balance of the security deposit within a specified period. As disclosed above, the appellant had accepted the PPM agreement. These nullity the appellant's right to mount a claim under this cause of action.

Conclusion on the issue of liability

[31] For reasons above, on the issue of liability, I agree with the learned trial judge that it was the appellant who breached the agreement and not the respondent. The appellant had failed to pay the balance of the security deposit within the stipulated time and despite indulgence by the respondent continued to breach this obligation until the termination of the grace period given by the respondent's in its letter of demand of 6 April 1989. Once the 14 days period stated therein expired, the agreement was considered unlawfully terminated by the appellant.

Is the respondent entitled to claim forfeiture of a sum equivalent to 10% of the consideration stated in the agreement?

[32] Though the appellant had breached the agreement, is the respondent entitled to claim a sum equivalent to 10% of the security deposit as compensation? Since the transaction between the parties was actually a sale and purchase of the said land, I treat this security deposit as the consideration for this sale and purchase. But before I proceed further, I must point out that what the respondent is claiming is not just money received but also a portion of that which has yet to be paid. The total amount claimed by the respondent is RM1.48m which, according to Dato' Sethu, represents 10% of RM15m after deducting RM200,000 received by the respondent from the appellant under the agreement. This, he said, is permitted by law. He cited *Karuppiah v Petaling Garden Co Sdn Bhd* [1972] 1 MLJ 173 and *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2005] 2 CLJ 914 which allowed forfeiture of 10% of the deposit. Apart from these cases, he also cited *Selva Kumar a/l Murugiah v Thiagarajah a/l Rernasamy* [1995] 1 MLJ 817 (SC) and *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 PC which say that 10% of the consideration in an agreement is a reasonable figure to forfeit. He then proceeded to explain that in *Pendergrast v Chapman* (1988) 2 NZLR 177, *Damon Cia Naviera SA v Hapag-Lloyd International SA* [1985] 1 All ER 475, *Bot v Ristevski* (1981) VR 120, and the Federal Court decision of *Morello Sdn*

Bhd v Jaques (International) Sdn Bhd [1995] 1 MLJ 577, the courts have ruled that 'even where the deposit sum is unpaid, the plaintiff can terminate, forfeit and sue to recover that sum'.

[33] Let me first point out that except for the case of *Selva Kumar v Thiagarajah* all the authorities cited relate to deposit paid or found to be paid under an agreement in dispute. They do not deal with part payment of a consideration in an agreement. There is apparently a difference between deposit and part payment towards a consideration. This distinction is highlighted in the Privy Council judgment of Lord Hailsham in *Linggi Plantations Ltd v Jagatheesan* where he said:

> In particular Lord Dunedin in *Mayson v Clouet & Anor* [1924] AC 980 establishes the fundamental difference between part payments which are recoverable in certain circumstances and deposits which are not

Mayson v Clouet is a Privy Council decision arising from the Supreme Court of the Straits Settlements in Singapore. The respondents who were developers entered into an agreement to sell a building to be constructed by them to one Sim Choon Kee. The purchase price was $250,000. A sum of $25,000 as deposit was paid immediately after the signing of the agreement. The balance was to be paid in this fashion: 10% of the balance within three months from date of agreement; a further 10% of the balance within 6 months from date of agreement and; the balance within 10 days of the production by the respondent of a municipal certificate stating that the building is completed. Clause 3 of the agreement provides that in the event of either of the two installments of 10% is not paid, the respondents are at liberty to cancel the agreement and all money paid to them shall be forfeited. But under clause 13 of the agreement, if the purchaser shall neglect or fail to comply with the above conditions his deposit may be treated as forfeited and the vendors shall be at liberty to resell the said property.

[34] The deposit and the two installments were paid by Sim Choon Kee but not the balance of the purchase price. The respondents terminated the sale and forfeited all sums paid under the agreement. Upon the death of Sim Choon Kee, his estate demanded from the respondents the return of the two installments of 10% each though conceding that the respondent could forfeit the deposit paid at the time when the agreement was signed.

[35] The Privy Council reversing the decision of the court below held that the right of the parties depended upon the contract, and although the purchaser was in default, the installments were recoverable since the contract distinguished between the deposit and the two installments/Forfeiture is only for the deposit.

[36] In this judgment of the Privy Council, the case of *Howe v Smith* (1884) 27 Ch D 89 was cited with approval by Lord Dunedin who said:

> *Howe v Smith* clearly comes to this, that if the learned judges had held that the deposit was only part payment and not a deposit proper, they would have ordered its return

[37] The facts of *Howe v Smith* are these: In a sale of a real estate, the purchaser paid a sum of £500 which was stated in the contract to be 'a deposit, and in part payment of the purchase money'. The purchase price was £12,500. A date for completion of this sale was fixed and the agreement stipulated that if the purchaser fails to complete, the vendor should be at liberty to resell and to recover any deficiency in the price as liquidated damages. When the purchaser could not complete the contract the vendor resold the property at the same price. This prompted the purchaser to bring an action against the vendor for specific performance of his contract with the vendor. This was dismissed by the court of first instance as well as on appeal. However, the Court of Appeal allowed the purchaser to amend his pleading to claim for the return of the deposit. The issue before the court was whether the sum of £500 paid as deposit and in part payment ought to be returned. It was here that the distinction between deposit and part payment is established as well as its consequences.

[38] As part payment cannot be subjected to forfeiture as compared to a deposit, I would consider all cases cited by the respondent (except *Selva Kumar v Thiagarajah*) distinguishable since they dealt specifically with deposit or the subject matter involved is clearly that of deposits. As I have said, *Selva Kumar v Thiagarajah* is the only case cited which does not carry the word deposit in the agreement between the parties.

[39] The facts in *Selva Kumar v Thiagarajah* are these: The parties were medical practitioners. The respondent who owned a clinic was desirous of selling it to the appellant for a sum of RM120,000. An agreement was entered into where the appellant paid to the respondent RM12,000 at the time of signing. He then paid a further sum of RM48,000. The balance of RM60,000 was to be paid by 15 monthly installments of RM4,000 each. However, after the appellant had paid up to RM96,000 he refused to proceed further to pay the remaining six monthly installments. The respondent sought to forfeit RM96,000 by relying on a clause in the agreement which says that if the appellant defaults, all monies paid up to the date of the default would be forfeited as agreed liquidated damages and thereafter the agreement would terminate. At the High Court, the respondent obtained a declaration that this clause is valid and enforceable against the appellant. Dissatisfied, the appellant appealed.

[40] Allowing the appeal and ordering the return of RM84,000, the Federal Court laid down the following principles of law: A

(1) There is no distinction in Malaysia between liquidated damages and penalties as understood under the English law in view of s 75 of the Contracts Act 1950 which provides that in every case the court must determine what is the reasonable compensation, 'whether or not actual damage or loss is proved to have been caused thereby' ('the words in question' which is found in s 75 of the Contracts Act 1950). B

(2) However, the words in question, viz 'whether or not actual damage was proved to have been caused thereby', are limited or restricted to those cases where the court would find it difficult to assess damages for the actual damage or loss, as distinct from or opposed to all other cases, when a plaintiff in each of them will have to prove the damages or the reasonable compensation for the actual damage or loss in the usual way C

(3) We hold that the precise attributes of such contracts in which it is difficult for a court to assess damages for the actual damage or loss, are cases where there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently and such loss is not too remote; then the court ought to award, not nominal damages, but instead, substantial damages not exceeding the sum so named in the contractual provision, a sum which is reasonable and fair according to the court's good sense and fair play D E

(4) Fourthly, we hold that in any case where there is inherently any actual loss or damage from the evidence or nature of the claim and damage for such actual loss is not too remote and could be assessed by settled rules, any failure to bring in further evidence or to prove damages for such actual loss or damage, will result in the refusal of the court to award such damages, despite the words in question F G

[41] Despite the word 'deposit' not being mentioned in the agreement, the Federal Court decided that, 'Apart from the real loss (which has not been proved), the vendor ought to be entitled, in any event, to forfeit any reasonable amount of earnest money or deposit. We have in our case, the deposit or earnest money, ie the sum of RM12,000 which was paid on signing the agreement by the purchaser to the vendor, see cl 1 (a)(i) of the agreement. The sum is equivalent to 10% of the purchase price and is part of the said sum of RM96,000 sought earlier to be forfeited by the vendor under cl 1 (a)(i) of the agreement...The sum of RM12,000, in all the circumstances of this case, is not too large to prevent it from being fully forfeitable. We would not interfere with it, and would allow the vendor to forfeit it or keep it'. Having disclosed these principles of law, I now return to examine the facts in our instant case. Adopting the advice handed down by the Privy Council in *Linggi Plantations Ltd v Jagatheesan*, as well as *Mayson v* H I

Clouet, I first look at the construction of the agreement itself. It is without doubt that this document was constructed to give an impression of a joint venture transaction when for all intent and purpose it was an outright sale and purchase of the said land for a consideration of RM15m. Though this consideration is described as a 'security deposit' the terms in the agreement do not reflect the true meaning of this phrase. If it is truly a security deposit then its objective must be to ensure the performance of certain obligations expected of the respondent. But what could this be in order to justify and commensurate the demand of such a generous sum? Except for the need of the respondent's best endeavour to apply for layout plans for the development of the said land (cl 4(a) of the agreement) and to jointly evict the squatters from the said land (cl 4(b) of the agreement), there is nothing else of significance required of the respondent to perform. These two obligations are minor in nature as compared to the work that must be undertaken by the appellant. And what would be the outcome of this security deposit after the undertaken acts of the respondent were duly performed? Instead of returning the security deposit to the depositor, the sum is to 'be treated in full satisfaction of the landowner's right and interest in the said land' (cl 13(b) of the agreement). If the respondent, as landowner, was to contribute said land in a joint venture, one would expect the respondent to surrender the said land to the appellant for a subsequent benefit. But instead, here, the respondent was to be paid up-front under the guise of a security deposit which 'shall be deemed to be unconditional payment by the landowner's share in the joint venture project...' (cl 2(a) of the agreement). Therefore considering the agreement as a whole, I would agree with Dato' Sethu's persistent and consistent stand that the agreement was an outright sale and purchase of the said land rather than one of a joint venture to develop the said land. Since the transaction was one of sale and purchase of land, then obviously the purchase price must be the RM15m. How was this to be paid is clearly set out in cl 2(a) of the agreement: RM200,000 considered paid upon execution of the agreement and RM14.8m within 100 days thereafter. This entire method of payment must inevitably be construed as payment in parts with no deposit. If so, and going by the authorities stated, the respondent would not be entitled to any forfeiture. Realizing this short coming, Dato' Sethu immediately argued that the entire consideration of RM15m stated in the agreement was the deposit. This could not be since he has maintained that this agreement was for a sale and purchase of the said land rather than a joint venture and, as I have said, the consideration for the entire sale was RM15m. One cannot have the entire consideration as a deposit. If it is, then the true meaning of deposit is lost. Further, if the entire sum of RM15m was the deposit, then why did the respondent not claim for this entire sum but rather only 10% of it. So obviously, by the nature of its claim, the respondent has resigned itself to the fact that the sum of RM15m was the entire consideration rather than a deposit.

[42] When the amount stated therein was meant to be a part payment then going by the authorities of *Linggi Plantations Ltd v Jagatheesan*, *Mayson v Clouet* and *Howe v Smith* it cannot be subjected to forfeiture. The innocent party is only entitled to sue for damages for breach of contract and damages has to be proved.

[43] Instead of proving actual damage or reasonable compensation for the actual loss suffered, the respondent chose to tag it to 10% of RM15m and called no further evidence. Whether this is permitted requires an examination of the evidence to determine whether it falls within the exception expressed in *Selva Kumar v Thiagarajah* which is: are the facts of this case within the limited or restricted situation where the court finds it difficult to assess damages for the actual loss or damage? The Federal Court in *Selva Kumar v Thiagarajah* cited *Chaplin v Hicks* [1911] 2 KB 286 as a case in point where assessment of actual loss or damage is difficult to access.

[44] In *Chaplin v Hicks*, Ms Chaplin, an actress, agreed with Hicks, a theatrical manager, for her to be present at a meeting with him to interview her and 49 other actresses where he would select 12 of them to be employed. He was in breach of contract for not giving Ms Chaplin a reasonable opportunity to attend the interview. It was also argued on his behalf in the Court of Appeal that only nominal damages were payable and the award of substantial damages by the High Court was wrong. The submission of nominal damages was to the effect that she would have had only a chance of one in four of being successful. The argument for nominal damages was rejected by the Court of Appeal and the High Court's award was upheld. Very clearly, Ms Chaplin failed to prove the damages for actual loss, ie the amount involved. The evidence in Ms Chaplin's case indubitably suggested a real loss, a loss that was not too remote, going by the rules in expounded *Hadley v Baxendale* (1854) 9 Exch 341; (1843–60) All ER Rep 461, but at the same time it was quite difficult to assess the damages or the amount of money that should be given to her for such loss of such opportunity to be selected.

[45] In association with this case, Peh Swee Chin FCJ in *Selva Kumar v Thiagarajah* said:

> In a good number of cases, rules for quantifying amounts of money for damages have evolved in courts for some but not all types of cases, in other words, a measure of damages for some of these cases has been respectively established, eg the measure of damages in a sale of goods being the difference between market value and contract price, etc. However, a measure of damages, ie a settled rule for assessing damage, has not been developed for cases of the type of Ms Chaplin's, and such measure for her case has still not been established. It would still be left to the good sense and fair play of the court to fix a reasonable amount as compensation. Thus, it will mean that for lack of an established measure of damages in any

A particular case, that case will be one in which the court finds it difficult to ascertain the amount of actual loss or damage. The court will not shirk its duty, however, when such actual loss or damage is manifested from the evidence and it is not too remote, to find a reasonable sum for the plaintiff.

B **[46]** Following this, I am of the view that the circumstances of this case do not fall within the stated exceptions. The respondent could have adduced evidence to prove loss of bargain for holding the said land rather than selling it to a third party while waiting for the payment of the balance of the purchase price from the appellant, akin to an aborted sale and purchase of C goods where evidence of loss would be the difference between market value and contract price or the loss of a profitable opportunity. I agree that sometimes this is cumbersome to prove and that is why the practice has grown to agree on the customary figure of 10% of the purchase price as a deposit which would be forfeited should the purchaser fail to complete the D purchase. And the objective behind payment of a deposit seems to be this: The first is to act as a guarantee that the purchaser means business (per Lord MacNaghten in*Soper v Arnold & Anor* (1889) 14 AG 429 at p 435). The second is to bind the vendor legally from disposing of the said property until the time for payment of the balance of the purchase price. And the E customary sum of 10% of the purchase price seems to be that as stated by Justice Bokhary PJ in the Hong Kong Final Court of Appeal case of *Poly set Ltd v Panhandat Ltd* (under appeal number 28 of 2000 delivered 25 February 2002):

F In Hong Kong as in many other parts of the world, a deposit representing 10 per cent of the purchase price of the land is conventional. If I were asked to account for the strict logic behind this percentage, I would have to answer that there is none that I know of and that there may be none that exists. I would augment or mitigate that answer by citing Mr. Justice Holmes's famous aphorism (in 'The Common G Law' (1881) at p.l) that "The life of the law has not been logic: it has been an experience". Perhaps all that can really be said is that, for a long time and in many different places, 10 per cent has in practice enjoyed both legal and commercial acceptance as generally appropriate.

H **[47]** But since no deposit is ever mentioned in our instant case and when actual loss or damage can be quantified by known and established measures then in absence of evidence to prove actual loss or damage, the respondent's claim for an aggregated sum of 10% of the consideration mentioned in the agreement should not be allowed. If at all any sum is to be forfeited, then it I would only be the RM200,000 which was paid at the time of the execution of the said agreement. This could be considered as 'deposit or earnest money', an approach adopted in *Selva Kumar v Thiagaraja* by the Federal Court, which seized upon a sum of RM12,000 paid by the defaulting party in an agreement and considered it as such despite there being no express

description of this as deposit or earnest money. I am of the view that this course was adopted to do justice in that particular case rather than setting down universal legal principle for general application. To do so would compromise on established legal principles and open flood gates to those who prefer shortcuts in proving actual loss or damage.

CONCLUSION

[48] For these reasons, I allow this appeal but with no order as to costs here and below. Deposit for this appeal to be refunded to the appellant.

Zainun Ali JCA (delivering majority judgment):

[49] Both the appellant ('the developer') and respondent (the landowner) are companies with limited liability. The respondent is the landowner and the appellant is the developer.

[50] The parties had, on 20 November 1987, entered into an agreement (which they called a joint venture agreement), where the respondent for consideration of RM15m, allowed the appellant to 'develop the said land by building therein various types of building together with infrastructures, common facilities, convenience and other amenities in accordance with plans to be approved by the relevant authorities and subject to terms and upon the conditions hereafter contained'.

[51] There were two pieces of land which were alienated to the respondent from the Government. It is important to look at the language of the agreement, particularly with regard to the mode of payment of the RM15m. This was how it is to be paid:

(i) RM200,000 upon execution of the agreement;

(ii) a further sum of Malaysian Ringgit Fourteen Million Eight Hundred Thousand only (RM14.8m) within one hundred (100) days from the date of the agreement, and this consideration is to be known as the 'Security Deposit'.

[52] It is also significant to note that the payment of the security deposit shall be deemed to be unconditioned payment of the landowner's share in the joint venture project payable by the developer to the landowner upon due observance and performance by the developer of all the covenants stipulations and undertaking on its part to be observed and performed herein.

[53] There were obligations imposed on both parties. The more significant ones affecting the respondent were that:

(i) The landowner under cl 4(a) shall apply for and use its best endeavour to obtain the approval of layout plans for the development of the said land from the authorities...

(ii) The landowner under cl 4(b) shall be jointly responsible for evicting the squatters from the said land...

[54] For doing these, the landowner was to get RM15m and discount of 10% from the selling price offered by the appellant to the public.

[55] Should the landowner not exercise his entitlement at the final phase of the development, 'the security deposit shall be deemed in full satisfaction of the landowner's right and interest in the said land'. (cl 13(b) agreement).

[56] And what of the appellant's obligation?

[57] The appellant has to pay the respondent the initial sum of RM200,000 which had since been paid. The appellant is to also pay the balance sum of RM14.8m within one hundred days "from the date hereof (i.e. the date of the agreement). The appellant must, at its own cost and expenses submit plans and build on the said land, including infrastructures and then sell those constructed buildings of which the appellant is to keep the entire purchase price from those sales.

THE APPELLANT'S CASE

[58] It would appear from both the testimony and documentary evidence that the appellant tried to secure a bank loan after the agreement was signed. This bank loan is to pay respondent the balance due from appellant, ie RM14.8m.

[59] However its banker MBF Finance Bhd informed the appellant that a company called Pembinaan dan Pemaju Malaysia (Selangor) Sdn Bhd ('PPMS') had lodged a caveat on the said land. It transpired that PPMS had signed an earlier agreement with the respondent (on 26 May 1987) where PPMS was appointed the main contractor by the respondent. The PPMS loaned the respondent a sum of RM442,914 as consideration for this appointment.

[60] It is this PPMS agreement which the respondent had entered into, which prompted the appellant to contend that the respondent had

committed a breach of the fundamental term of the agreement which they both had signed (the appellant and respondent). According to the appellant, the existence of the PPMS agreement had deprived the appellant the exclusive right to develop the said land.

[61] This is manifested when in its reply to the respondent for its failure to pay the balance of the security deposit of RM14.8m, the appellant in a letter of 19 April 1989 stated that:

> The joint venture agreement was not proceeded with by reason of your failure to surrender the document of title to the Bankers and for the rescission of the contract you have entered into with Pembinaan dan Pemaju Mahajiwa (Selangor) Sdn Bhd and further you have failed to refund the sum of RM300,000 to us by 12 June 1988...

[62] The said sum of RM300,000 was actually in reference to a purported loan of RM200,000 which was supposed to be given by the appellant under the agreement, to the respondent for payment of quit rent and other charges imposed on the land.

[63] The appellant did not pay the said charges. Instead the appellant requested that respondent company shareholders deposit their share certificates in the respondent company, with the appellant and in return, the appellant would lend RM200,000 to the respondent.

[64] However, though the share certificates were handed over to the appellant, the RM200,000 was not forthcoming from the appellant.

[65] However the rents and outgoings were duly paid by the respondent when a new group of shareholders took over the respondent.

[66] The real turning point for this case occurred when the appellant failed to pay the balance of the security deposit of RM14.8m.

[67] Thus on 6 April 1989, the respondent by letter demanded from the appellant 'full payment of this sum within 14 days failing which the agreement would be terminated and the sum equivalent to 10% of the security deposit forfeited'.

THE RESPONDENT'S CASE

[68] The respondent's cause of action was founded on breach of contract by the appellant for non-payment of the balance of the security deposit of RM14.8m, since it had complied with it's side of the bargain.

A **[69]** The critical issues before this Court are twofold:

(a) which of the parties is guilty of breach of contract?;

(b) whether there is a right of forfeiture in the JVA and If so, what is the quantum forfeitable?

B

[70] The appellant contend that it was the respondent who had breached the agreement when the respondent entered into the PPMS agreement on 26 May 1987 with Pembinaan and Pemaju Mahajiwa (Selangor) Sdn Bhd making PPMS its 'main contractor'.

C

[71] Thus when, on 20 November 1987, the parties entered into an agreement (JVA), the respondent would provide the land and the developer was to have the right to construct building thereon, and take over all infrastructures works. The developer would sell the lands and appropriate all
D payments made by purchasers of the building.

[72] In return for this right to construct and develop and sell, the developer was to pay the sum of RM15m to the landowner (respondent) within a
E period of 100 days from 20 November 1987.

[73] It was only in February 1989 that the appellant discovered the existence of a caveat over the land lodged by PPMS, when the appellant applied for a loan facility with MBF Finance Bhd. for the 'development' of
F the land.

[74] According to the appellant this transaction was unknown to the appellant at the time the JVA was executed on 20 November 1987 (about six months later).

G

[75] The appellant contend that the respondent ought to have but did not, inform the appellant of this PPMS agreement. And for this reason the respondent was in no position to and disabled itself from giving good consideration to the appellant for its payment of RM15m.

H

[76] The appellant contend that the entire JVA became 'voidable' at the appellant's option for the total failure of consideration for as long as the contract between respondent and PPMS existed, since the appellant could not 'build' or 'develop' the land as envisaged by the parties. Moreover this was
I the sole consideration the respondent had to grant to the appellant, in exchange for payment of RM15m.

[77] For the respondent, it was argued that there was good consideration because at the material time when the JVA was signed between appellant and respondent, although there was this agreement with PPMS, there was no caveat on the land at the material time. Thus the land was then unencumbered. Though there was a subsequent caveat, the respondent had it removed by order of court.

[78] The respondent, as did the learned trial judge, found that appellant was in breach for non-payment of the deposit and quit rent. In any case, payment is a fundamental term and even if time originally fixed had ceased to be of the essence, the appellant can reimpose time which it did.

[79] The appellant had also stated that the respondent had failed in its obligation since by virtue of the caveat, it was unable to charge the land. The appellant's purpose for the charge in question was to take out a loan to pay the respondent the balance sum of the security deposit.

[80] Be that as it may, in view of these conflicting issues, the appellant argued that it is allowed to now raise the point of 'failure of consideration' for the first time on appeal. The appellant says total failure of consideration renders the JVA voidable with restitution under Sections 65 and 66 (Contracts Act 1950) or affirmation thereof with damages for breach of contract under the Act. The authorities referred to were:

(1) *Fibroska Spolka Kevina v Fairbairn* F9431;

(2) *Koh Siak Poo v Sayang Plantation Bhd* [2002] 1 MLJ 65.

[81] The appellant contended that on this ground of total failure of consideration, the appellant as the innocent party had one of two choices:

(i) he could treat the contract as at an end and seek refund of all monies paid; or

(ii) he may rest his claim on the basis of the contract and seek damages for breach.

[82] More importantly it is the appellant's contention that the respondent's ability to forfeit 10% of the deposit is irrelevant because no forfeiture can be made on a void/voidable agreement. The appellant says it is inequitable for the respondent to demand forfeiture when its own conduct brought about the breach of the JVA.

[83] In addition the appellant contended that the respondent was in breach of fiduciary duties, entitling the appellant to general damages.

[84] One fact must not be lost sight of. It is this. The appellant, upon discovery of the caveat staged a protest in correspondences with the respondent. If there was a breach by the respondent in this regard, the appellant chose not to terminate the JVA, neither did it rescind the JVA for alleged misrepresentation. The end result was that, the appellant conceded to appoint PPMS as it contractor in the joint venture project.

[85] The other question raised by the appellant was with regard to the charge to secure the loan to pay the security deposit. The appellant laid blame squarely on the respondent, when the appellant could not obtain the loan due to the caveat. On this point, I have this to say: Reading cll 5 and 2(a) of agreement, there is nothing to suggest that the creation of a charge is a condition precedent for the payment of the balance of the security deposit. In other words, the payment of the security deposit was not conditional upon the creation of the charge. In fact cl 4(c) make the payment of deposit a condition precedent before the grant of the power of attorney to the appellant to create a charge: In short, the obligation to create the power of attorney only arose 'upon full payment of the security deposit'.

[86] To top it all, there is nothing in cl 5(c) to suggest that the loan is to pay the security deposit.

[87] The way I see it, there was a misconception on the appellant's part with regard to the contract with PPMS. This contract was not an encumbrance binding on the land but a personal obligation. In any case, that contract with PPMS was inchoate, subject to further terms and conditions (para (3)).

[88] In the context of this case, it is instructive to also look at the conduct of parties.

[89] It is clear that the appellant was either unsure of what to do after signing the JVA, or that it was in a dilemma of sorts, after obtaining legal opinion from Tetuan Shearn Delamore & Co.

[90] Even the appellant's own witness DW1 (Dato' Chan) could not give an intelligible reply during cross-examination as to why the appellant had wanted to revoke the agreement on the same day it was signed.

[91] The appellant, if it truly believed the respondent was in breach of the agreement could exercise any of its options. They never did. Instead, the appellant applied to re-negotiate new terms especially towards payment of the security deposit.

[92] The defendant had asked for several extensions to pay the balance of the security deposit and thereafter, fixed extensions were given. A

[93] The respondent granted an extension of 30 days from the expiry of the original 100 days from 20 November 1987 which should expire on 29 February 1988 and a further 30 days which expired on 29 March 1988. B

[94] Still, the balance was not paid on 29 March 1988. The appellant sought a further extension of 30 days which expired on 28 April 1988.

C

[95] However before the 28 April 1988 was up, the parties met on 8 April 1988 and the respondent agreed to an extension of 75 days to 'expire on June 1998 at midnight'. This was an extension of fixed time.

[96] The appellant accepted the extension on terms that a supplementary agreement was drawn up. When no payment was forthcoming from the appellant, the appellant proposed changes to the agreement which the respondent rejected. However the continued negotiations did not alter the appellant's primary obligations in the JVA but merely postponed it. So when no payment was made, the respondent demanded the payment of the balance of the security deposit by its letter dated 6 August 1989, within 14 days. D E

[97] This made time the essence of the contract. The appellant replied that the agreement can only be terminated if the initial payment of RM200,000 was refunded. I find this suggestion baseless. F

[98] In fact, what I do find is that by making the proposal, for the execution of a new joint venture agreement, on new terms and conditions the appellant clearly evinced an intention that it was not able to and did not want to perform the earlier agreement and this amounts to a clear repudiation. Yet the appellant did not repudiate the agreement. G

[99] Now I come to the heart of the matter. If it is proven that there is breach on the part of the appellant, can the respondent forfeit the deposit? And if so, how much is forfeitable? H

[100] As I said earlier the appellant's contention is that it is inequitable for the respondent to demand forfeiture when its own conduct brought about the breach of the JVA, by suppressing material facts, making performance impossible. I

[101] The appellant's entire case was that the termination was wrongful and there was no liability for forfeiture but that in fact the respondent itself was in breach of its fiduciary duties and that the respondent was liable to compensate the appellant.

[102] At the risk of repetition, I need to reiterate here that it was the appellant's case that the balance of the security deposit was only payable after the creation of a charge.

[103] I do not agree with the appellants' contention. There is nothing in cll 5 or 2(a) to suggest this, since these are independent obligations.

[104] In fact in construing the relevant clauses in the agreement, ie cll 5 and 2(a) and having seen evidence of parties, it is clear that time for payment of the deposit is fixed, whereas there is no time fixed for creation of the charge which inevitably negatives the suggestion of a condition precedent.

[105] This inability to get the loan means that the deposit sum was unpaid.

[106] But what would be the situation if the deposit sum is unpaid? In the instant appeal, the appellant had only paid RM200,000. Perusing authorities on this point, it is shown that even where the deposit sum is unpaid, the respondent can still terminate, forfeit and sue to recover that sum (see *Pendergrast v Chapman* (1988) 2 NZLR 177; *Bot v Ristevski* [1981] VR 120 p 81 headnote: *Morello Sdn Bhd v Jacqaues (International) Sdn Bhd* [1995] 1 MLJ 577

[107] In the circumstances, the respondent can rightly sue for recovery of the deposit even though it remains unpaid.

[108] After all that has been said, the meaning of 'deposit' now writs large. James LJ in *Ex p Barrel* LR 10 Ch 512 observed that:

> The deposit as I understand it... is a guarantee that the contract shall be performed... If the sale goes on, it goes in part payment of the purchase money for which it is deposited, but if on default of the purchaser the contract goes off, that is to say if he repudiates, the contract, then he can have no right to recover the deposit.

[109] A succinct definition of 'deposit' was also stated by Lord MacNaghten in *Soper v Arnold* [1889] 14 App Cas 429 where he said:

A deposit is defined as serving two purposes, that is, if the purchase is carried out, it goes against the purchase money. But the primary purpose for the deposit is to act as a guarantee that the purchaser means business

[110] Coming back to the instant appeal, the issue arose as to whether the sum to be forfeited is the RM200,000 initially paid, or 10% of the entire consideration of RM15m. An important corollary to that issue is, why should the court take 10% of the consideration of the deposit as forfeiture, not 20% or 30% as the case may be.

[111] Firstly, a careful reading of the joint venture agreement on 20 November 1987 would show that the agreement makes it clear why the entire purchase consideration was made a security deposit. As is clear, the title carried a restriction that there can be no charge or transfer without the State consent.

[112] The relevant clauses which manifest the legal position can be found in cl 2(a) and cl 4(c) which requires respondent to execute an irrevocable power of attorney to the appellant including power to create a charge; cl 5(a) empowers the appellant to raise loans on a security of the land and cl 10 enable the appellant to sell the developed units to third parties, but the respondent as landowner must be a party.

[113] Thus these provisions enable the appellant to deal effectively with the land with third parties. However by these acts, the respondent could or would have lost the land, in the event of the appellant's default. The said land would not be reverted to the respondent since the rights of third parties would have intervened.

[114] In this context, it is no surprise therefore that the agreement provides that the entire consideration had to be paid as a security deposit so as to protect the respondent against any default by the appellant and consequent loss of the land.

[115] Given the risk that the Respondent is exposed to, there is nothing unusual in the entire sum being agreed by both parties as a 'security deposit' ie the amount of RM15m.

[116] However the word 'deposit', innocuous as it looks, has a technical life of its own, and thus a careful look at its definition and construction is necessary.

[117] Is there a difference between the word 'deposit' and 'true deposit?' The word 'true deposit' means a deposit which is within the bounds of an earnest performance. (Since essentially a forfeited deposit serves as an earnest of performance).

[118] In fact the majority decision in *Morello Sdn Bhd v Jacqaues (International) Sdn Bhd* [1995] 1 MLJ 577 at p 588 said that:

> In considering the question what was expressly stipulated as a deposit in the agreement was a true deposit, we have paid due regard to the terms of the agreement as a whole, and the surrounding circumstances

[119] Consequently if a deposit is a true deposit, it will be forfeited to the vendor if the purchaser wrongfully fails to perform his part of the bargain. This is so even if the 'vendors', loss is less than the deposit. This is so even if the vendor suffers no loss at all. The test normally accepted to ascertain whether a sum is within the bounds of an earnest of performance and therefore deemed a true deposit is where it represents 10% of the purchase price of the land (see *Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711).

[120] In the instant appeal whether 10% of the 'security deposit' in the agreement is a true deposit depends on the construction of the contract between the parties.

[121] Though in some cases such as *Linggi Plantation v Jagatheesan* [1972] 1 MLJ 89 the court would grant relief against forfeiture of a deposit, there may be instances where the irrecoverable nature of a deposit is qualified by the insertion of the adjective 'reasonable' before the noun.

[122] Where a deposit is reasonable, it has always been regarded as a true deposit, namely a guarantee of performance as well as part payment on account and that the court will not regard a forfeiture of such payment as a penalty.

[123] It has been suggested that in the instant appeal, a distinction need be drawn between a deposit simpliciter and part payment of a consideration.

[124] Most of the authorities cited in the instant appeal relate to deposit paid or found to be paid under an agreement between parties in dispute.

[125] They do not actually deal with part payment of a consideration. But whether the subject matter under consideration is not a deposit but a part payment towards money consideration, really turns upon the construction of the contract between the parties. A

[126] For our purposes here, the question is — Is there a distinction between a deposit and part payment for purchase of land, for example? B

[127] Lord Hailsham in *Linggi Plantations* said that:

> In particular Lord Dunedin in *Mayson v Clouet* [1924] AC 980 establish the fundamental difference between part payments which are recoverable in certain circumstances or deposits which are not. C

[128] In *Mayson v Clouet* the Privy Council in reversing the decision of the court below held that the right of the parties depended upon the terms of the contract and intention of parties. It is my view that this is the lynchpin to this whole issue. D

[129] So in *Mayson*'s case, although the purchaser was in default, the instalments were recoverable since the contract itself makes a distinction between the deposit and the two instalments, where the forfeiture is only for the deposit. E

[130] In short, the character of the payment depends on the parties' intentions to be obtained by construing the agreement. (*Mayson v Clouet*). Or as the majority decision in *Morello* said, in determining whether money has been paid by way of deposit or by way of part payment, considerable weight is to be given to the label attached by the parties to the payment (see *Howe v Smith* (1884) 27 Ch D 89. I am in complete agreement with Edgar Joseph Jr FCJ (as he then was) when His Lordship said: F G

> Especially is this so in a case such as this where the agreement had been entered into by two incorporated companies, engaged in trade, both commercially autonomous fully informed of all the relevant facts, with free access to legal advice and having regard to the degree of formality in the wording of the agreement H

[131] In *Morello*'s case, there is cl 3 which expressly provides for an initial payment of RM116,700 by way of 'deposit to be paid upon signing of the contract'. The seller however agreed to accept late payment of the deposit. I

[132] The Federal Court in *Morello* said that this 'unpaid' deposit did not lose its character as a deposit and the seller sought recovery of the unpaid deposit, which the court allowed.

A **[133]** Similarly in the instant appeal, the appellant chose not to pay the 'security deposit' according to the terms of the JVA.The appellant only paid the initial RM200,000. Is the respondent to be in any worse position just because the deposit was not paid when the time came for it to be paid?

B **[134]** Looking again at the JVA, the security deposit is described as 'unconditional payment' of the respondent's share in the joint venture project payable by the appellant.

C **[135]** Thus in *Bot v Ristevski* [1981] VR 120. Justice Brooking sitting in the Supreme Court of Victoria held that 'when a vendor had terminated a contract by accepting the purchaser's repudiation, he would be entitled to recover an unpaid deposit on the ground that in such a situation there will have been no failure of consideration since the consideration for the deposit was not the conveyance but the entering into the contract'. (per Edgar Joseph Jr JCA in Morello's case).

D **[136]** Likewise in the instant appeal.

E **[137]** Following the principle as found in *Morello* decision, money paid as a deposit cannot be paid on some terms implied or expressed. And monies to be paid as the event of the contract being performed shall be so paid. The monies to be paid in the instant appeal is not merely a part payment, it is also an earnest to bind the bargain so entered into.

F **[138]** Coming back to the instant appeal, the contract clearly describes both payments as 'security deposit'. Thus the entire amount is the deposit. Both the appellant and respondent have their respective obligations under the agreement. Whether one party's obligation is more onerous than the other is G of little consequence. What is important is what is their intention as manifested in the agreement?

[139] As had been expressed earlier, in view of the rights and obligations of the parties and the risk imposed on the respondent against any default by the H appellant, and upon a plain reading of the agreements there is no doubt that RM1.5m represent a true deposit and that the respondent is entitled to forfeit the sum when the appellant failed to comply with cl 2(a) of the agreement.

I **[140]** Much was said by the appellant about there being no right of forfeiture in the agreement. However I find that an express provision for forfeiture is not an essential component. This is a contract of sale, where a deposit being an earnest for performance of a contract, confers a consequential right of forfeiture (subject to its constructions and terms and conditions).

[141] Again, at the risk of being repetitive, the critical factor is the character of the payment which is largely dependent on the parties' intention, ascertained by construing the agreement. This view finds support in authorities such as *Polyset-Pendergrast v Chapman* [1988] 2 NZLR 177 and *Damon Cia Naviera SA v Hapag-Lloyd International SA* [1985] 1 All ER 475.

[142] In *Polyset Ltd v Panhandat Ltd* [2002] 3 HKLRD 319 Bokhary PJ in setting out the facts said that four sums were paid in advance. The first sum was described as "deposit and part payment'. The three subsequent payments were also similarly described, the only difference is that they have inserted the word 'further' — which now read as 'further deposits and part payments'.

[143] Thus in *Polyset*, as in the instant appeal, both payments, albeit the entire consideration were described as 'security deposit'.

[144] Thus it is for the parties to define what sum constitutes a deposit under the contract. In dealing with this point, Ribeiro PJ in *Polyset* observed that:

> distinguishing between deposit and mere advance payment: that the nature or legal incidents of a deposit can be defined. The character of the payment depends on the parties' intention ascertained by construing the agreement...

[145] So is 10% a reasonable sum to be forfeited from the entire amount of RM15m? On this point in *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 the Privy Council imported a test of reasonableness.

[146] Lord Browne-Wilkinson observed, inter alia that:

> In order to be reasonable a true deposit must be objectively operating as 'earnest money' and not as a penalty.

[147] Thus, the reasonableness of a deposit is to be tested against the conventional or customary level of deposits generally taken as an earnest of performance.

[148] As manifested in various authorities, the test normally accepted to ascertain whether a sum is within the bounds of as earnest of performance and therefore deemed a true deposit is where it represents 10% of the purchase price of the land. In short, it's conventionally accepted that a the deposit of 10% is a true deposit (see *Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711).

[149] As case laws in various jurisdictions have shown, a deposit of 10% of the purchase price is quite commonplace and has enjoyed widespread commercial approval and acceptance.

[150] So too, in the instant appeal. I am of the view that the respondent is entitled to a forfeiture of 10% of the total consideration of RM15m, discounting the RM200,000 already paid.

[151] For the above said reason, I dismiss this appeal with costs and deposit to account for taxed costs.

[152] My learned brother Mokhtar Sidin JCA have seen this judgment in draft and is in agreement with it.

Appeal dismissed.

Reported by Loo Lai Mee